

**United States Department of Labor
Employees' Compensation Appeals Board**

E.V., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PATROL, Larado, TX,
Employer**

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**Docket No. 10-1284
Issued: February 3, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 6, 2010 appellant filed a timely appeal from a February 26, 2010 merit decision of the Office of Workers' Compensation Programs finding that she received an overpayment of compensation and denying waiver. She also appealed a March 22, 2010 nonmerit decision denying her request for a prerecoupment hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$1,662.54 from April 15 to May 9, 2009 because she received compensation for total disability when she had earnings from employment; (2) whether the Office properly denied waiver of the overpayment; and (3) whether the Office properly denied appellant's request for a prerecoupment hearing as untimely.

FACTUAL HISTORY

On August 20, 2008 appellant, then a 36-year-old canine officer, filed a claim for an injury occurring on July 21, 2008 when she twisted her left wrist grabbing her dog's collar to prevent a fight. The Office accepted the claim for a left wrist sprain and a closed fracture of the left ulnar radius.

On October 30, 2008 appellant underwent surgery to repair a torn triangular fibrocartilage. The Office paid compensation for disability.

On April 1, 2009 the employing establishment informed the Office that appellant had returned to limited-duty work on March 31, 2009. On April 2, 2009 appellant requested compensation for leave without pay beginning April 1, 2009. On May 7, 2009 the Office paid her net compensation of \$4,589.27 for the period April 1 through May 9, 2009.

On May 27, 2009 the employing establishment related that appellant worked four hours a day from April 15 to May 29, 2009, when she was released for full duty.

On June 16, 2009 the Office notified appellant of its preliminary determination that she received an overpayment of \$2,941.84 from April 15 to May 9, 2009 because she received compensation for disability after she returned to work. It further informed her of its preliminary finding that she was at fault in creating the overpayment because she should have known that she was not entitled to compensation after she resumed work. On June 26, 2009 appellant requested a prerecoupment hearing. She challenged that the overpayment occurred, arguing that she received \$2,941.84 for hours that she was on leave and further contended that the Office had not paid her from May 10 to 24, 2009. Appellant submitted pay slips showing hours of leave without pay (LWOP) used. On September 3, 2009 she submitted an overpayment recovery questionnaire.

Following a preliminary review on November 19, 2009 the Office hearing representative vacated the preliminary determination of overpayment. She found that the Office incorrectly calculated the overpayment based on a finding that appellant returned to employment full time rather than part time. The hearing representative remanded the case for the Office to determine the amount of compensation it should have paid her from April 15 to May 9, 2009.

Appellant submitted a December 8, 2009 leave analysis. On January 25, 2010 the Office notified appellant of its preliminary determination that an overpayment of \$1,662.54 existed because she received compensation for total disability from April 15 through May 9, 2009 after she returned to part-time work. It found that she worked eight hours on April 15 and 16, 2009, took sick leave on April 17, 2009, and had scheduled off days on April 18 and 19, 2009. The Office further determined that appellant used 55 hours of LWOP from April 15 to May 9, 2009. It calculated the overpayment by subtracting the compensation to which she was entitled from April 1 to May 9, 2009, \$2,916.73, from the amount that she received \$4,589.27, to find an overpayment of \$1,662.54. The Office further advised appellant of its finding that she was without fault in creating the overpayment. It requested that she complete the enclosed overpayment recovery questionnaire and submit supporting financial documents. Additionally,

the Office notified appellant that, within 30 days of the date of the letter, she could request a telephone conference, a final decision based on the written evidence or a prerecoupment hearing.

Appellant did not respond to the preliminary notice of overpayment.

On February 26, 2010 the Office found that she received an overpayment of \$1,662.54 from April 15 to May 9, 2009 and that she was not at fault in creating the overpayment. It denied waiver of the overpayment and found that she should send in a check for the entire amount of the overpayment as repayment.

On March 5, 2010 appellant requested a prerecoupment hearing and requested waiver. She contended that the Office still owed her money for days that she took LWOP. By decision dated March 22, 2010, the Office denied her request for a prerecoupment hearing as untimely.

On appeal, appellant related that she did not receive the preliminary notice of overpayment until the end of February 2010 and that she submitted the requested information as soon as she could. She also argued that she was not at fault in creating the overpayment as she provided information about her employment and did not believe that she had accepted an incorrect payment. Appellant maintained that the Office owed her compensation for days that she was on LWOP from May 10 to 24, 2009.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of the Federal Employees' Compensation Act¹ provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² When an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.³

A claimant is not entitled to receive total disability compensation and actual earnings for the same period. Office procedures provide that an overpayment in compensation is created when a claimant returns to work but continues to receive wage-loss compensation.⁴

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for a left wrist sprain and a closed fracture of the left ulnar radius. It paid her compensation for total disability beginning October 30, 2008. On April 15, 2009 appellant returned to work with the employing establishment. She worked full

¹ 5 U.S.C. §§ 8101-8193.

² *Id.* at § 8102.

³ *Id.* at § 8129(a).

⁴ *Danny E. Haley*, 56 ECAB 393 (2005); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (May 2004).

time on April 15 and 16, 2009, used sick leave on April 17, 2009 and had scheduled days off on April 18 and 19, 2009 and worked full time on April 20, 2009. From April 21 to May 9, 2009 appellant used 55 hours of LWOP. The Office paid compensation for total disability through May 9, 2009. When an employee has earnings from employment, appellant is not entitled to receive total disability benefits and actual earnings for the same time period.⁵ Additionally, if an employee returns to work and is in a paid leave status, she is not entitled to receive wage-loss compensation for total disability for the same time period.⁶ As appellant received compensation for total disability after she returned to work and for time that she received sick leave from the employing establishment, she received an overpayment of compensation.

The Office calculated the overpayment by subtracting the compensation to which she was entitled from April 1 to May 9, 2009, \$2,916.73, from the amount that she received \$4,589.27, to find an overpayment of \$1,662.54. The Board will affirm the fact and amount of overpayment.⁷

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of the Act⁵ provides that an overpayment must be recovered unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.” Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. The Office must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of the Act or would be against equity and good conscience.⁶

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship because the beneficiary needs substantially all of his income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary’s assets do not exceed a specified amount as determined by the Office from data provided by the Bureau of Labor Statistics.⁸ An individual’s liquid assets include but are not limited to cash, the value of stocks, bonds, savings accounts, mutual funds and certificates of deposits.⁹ Nonliquid assets include but are not limited to the fair market value of an owner’s equity in property such as a camper, boat, second home and furnishings and supplies.¹⁰

⁵ *Daniel Renard*, 51 ECAB 466 (2000); 20 C.F.R. § 10.403(c).

⁶ 20 C.F.R. 10.401(a).

⁷ The Board notes that \$4,589.27 minus \$2,916.73 yields \$1,672.54.

⁸ 20 C.F.R. § 10.436. Office procedures provide that assets must not exceed a resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or dependent plus \$960.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6(a) (October 2004).

⁹ *Id.*

¹⁰ *Id.*

Section 10.437 provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹¹ To establish that a valuable right has been relinquished, it must be shown that the right was in fact valuable, that it cannot be regained and that the action was based chiefly or solely in reliance on the payments or on the notice of payment.¹²

ANALYSIS -- ISSUE 2

The Office's January 25, 2010 preliminary notification of the existence of the overpayment, informed appellant that she needed to explain her reasons for seeking a waiver, complete the recovery questionnaire form and submit financial documents to support her claimed income and expenses. The overpayment recovery questionnaire is designed to obtain the financial information to determine whether adjustment or recovery would defeat the purpose of the Act. Appellant did not return the overpayment recovery questionnaire provided by the Office and did not otherwise submit financial evidence or supporting documentation to establish that recovery of the overpayment would defeat the purpose of the Act. Neither did she submit evidence to establish that recovery of the overpayment would be against equity and good conscience because, in reliance on the overpaid compensation, she relinquished a valuable right or changed her position for the worse. Although appellant is without fault in the creation of the overpayment, she nevertheless bears responsibility for providing the financial information necessary to support her request to waive recovery of the overpayment.¹³ Section 10.438 of the regulations states that a claimant who received an overpayment is responsible for providing information about income, expenses and assets to the Office so that it may determine whether recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience.¹⁴ Failure to submit the information, which will also be used to determine a repayment schedule if necessary, without 30 days of a request from the Office will result in a denial of a waiver of recovery of the overpayment and no further requests for waiver will be considered until the information is submitted.¹⁵

As appellant submitted no evidence in this case to establish that recovery of the overpayment would defeat the purpose of the Act or be against equity and good conscience, the Board finds that the Office did not abuse its discretion in refusing to waive recovery of the overpayment.

¹¹ *Id.*

¹² *Id.* at § 10.437(b)(1).

¹³ *Madelyn Y. Grant*, 57 ECAB 533 (2006); *James A. Gray*, 54 ECAB 277 (2002).

¹⁴ 20 C.F.R. § 10.438(a).

¹⁵ *Id.* at § 10.438(b); *Robert B. Hutchins*, 52 ECAB 344 (2001).

On appeal appellant argues that she provided all requested information as soon as she received the overpayment recovery questionnaire at the end of February 2010. She did not, however, provide any evidence that she did not receive the questionnaire until the end of February 2010. The Office mailed the January 25, 2010 preliminary notice of overpayment to appellant's address of record; consequently, it is presumed to have arrived in due course.¹⁶ Appellant additionally contends that she is not at fault in creating the overpayment as she promptly reported her employment. The Office, however, did not find that she was at fault in creating the overpayment but instead, as discussed, denied waiver because she did not timely submit the requested financial information. Appellant also maintains that the Office did not pay her compensation for LWOP taken from May 10 to 24, 2010. The Board's jurisdiction, however, is limited to review of final decisions of the Office.¹⁷

LEGAL PRECEDENT -- ISSUE 3

The Office regulations on the recovery of overpayments provide that before collecting the overpayment, it must provide the claimant with written notice of the fact and amount of the overpayment, the finding of fault, the right to submit evidence challenging the fact, amount or finding of fault, and the right to request waiver of the overpayment.¹⁸ Its regulations further provide that a claimant may request a precoupment hearing with respect to an overpayment.¹⁹ Failure to request the precoupment hearing within 30 days shall constitute a waiver of the right to a hearing.²⁰ The only right to a review of a final overpayment decision is to the Board.²¹ The hearing provisions of 5 U.S.C. § 8124(b) do not apply to a final overpayment decision.²²

ANALYSIS -- ISSUE 3

The Office's January 25, 2010 preliminary determination of overpayment provided appellant with a right to request a precoupment hearing within 30 days. As noted above, if a claimant does not request a hearing within 30 days, it is considered a waiver of the right to a hearing. When the final overpayment decision is issued, there is no right to a hearing or a review of the written record, and the Office does not have discretion to grant such a request. The only right to appeal is to the Board.²³ Appellant requested a precoupment hearing on March 5, 2010, more than 30 days after the preliminary overpayment finding and after the February 26, 2010 overpayment decision. Once the Office issued the final overpayment decision on February 26,

¹⁶ *W.P.*, 59 ECAB 514 (2008).

¹⁷ 20 C.F.R. § 501.2(c).

¹⁸ *Id.* at § 10.431.

¹⁹ *Id.* at § 10.432.

²⁰ *Id.*

²¹ *Id.* at § 10.440(b).

²² *Id.*; see also *L.C.*, 59 ECAB 569 (2008); *Philip G. Feland*, 48 ECAB 485 (1997).

²³ *Supra* note 21.

2010, her only right of appeal was to the Board. The Board thus finds that the Office properly denied appellant's March 5, 2010 request for a hearing as she was not entitled to a hearing with respect to a final overpayment decision.²⁴

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$1,662.54 from April 15 to May 9, 2009 because she received compensation for total disability when she had earnings from employment. The Board further finds that the Office properly denied waiver of the overpayment and properly denied her request for a prerecoupment hearing as untimely.²⁵

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 22 and February 26, 2010 are affirmed.

Issued: February 3, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

²⁴ *Id.*

²⁵ With respect to the recovery of the overpayment, the Board's jurisdiction is limited to those cases where the Office seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002).